No. 142.

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SUPREME COURT

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THE UNITED STATES,

OCTOBER TERM, 1898.

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ROBERT G. WILSON,
Plaintiff in Error,
vs.
EUREKA CITY,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

Brief and Argument for Plaintiff in Error.

J. W. N. WHITECOTTON,
Attorney for Plaintiff in Error.

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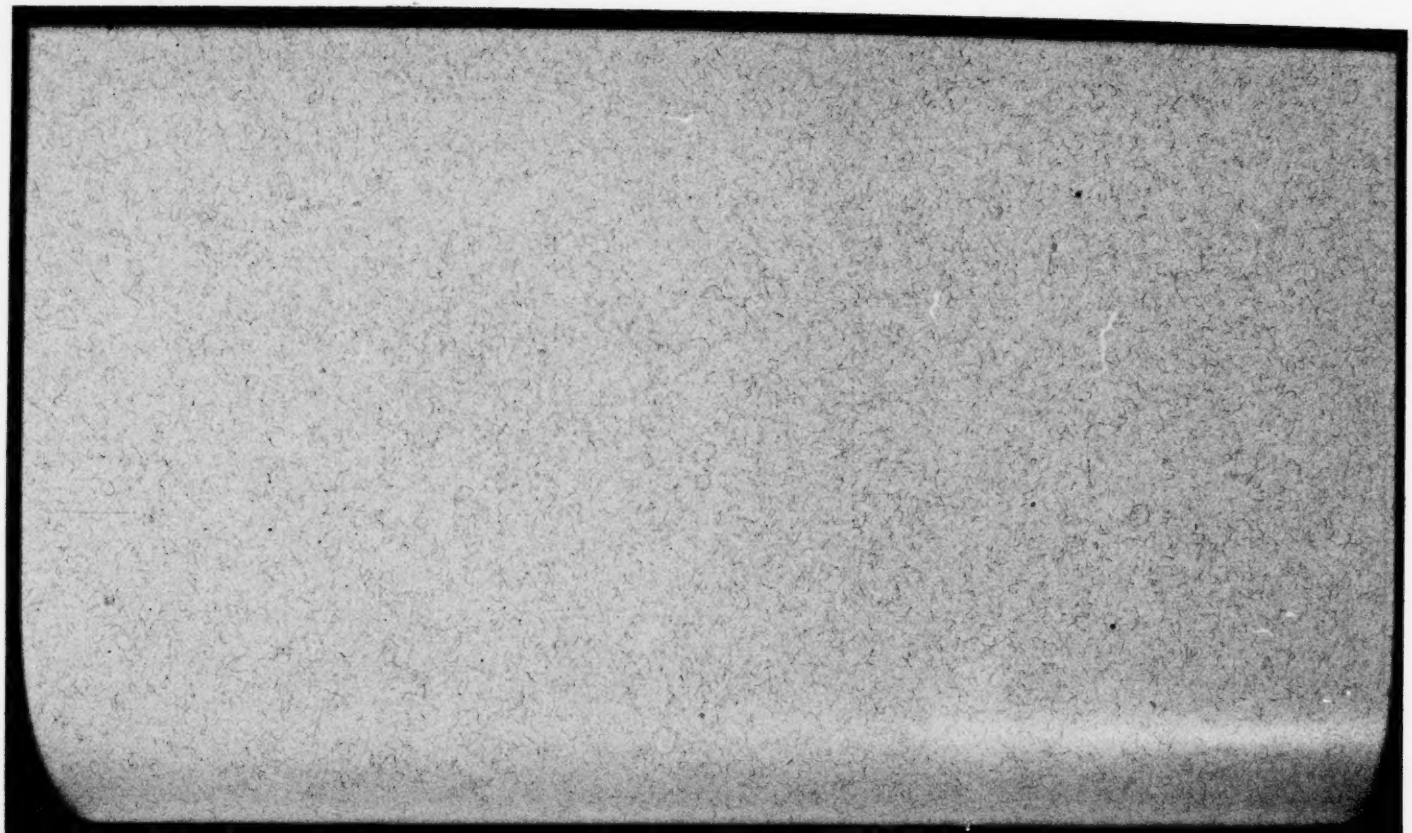

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Brief and Argument for Plaintiff in Error.

This case was commenced by filing a complaint in the Justice's Court of Eureka City on the 15th day of May, 1895, charging the defendant there, with having, on the 14th day of that month, wilfully, knowingly, and unlawfully moved a certain frame building into and upon one of the public streets

of Eureka City, to-wit: the Main street, and thereby obstructing the free passage of said street, without having from the Mayor, or president of the City Council, or any councilor of the common council of said city, written or any permission so to do, contrary to section 12, of Ordinance No. 10, of said city.

To this complaint, the defendant entered his plea of "not guilty," proceeded to trial, was found guilty and adjudged to pay a fine of $25.00, from which judgment he appealed to the district court of the First Judicial District of the Territory of Utah, where, by leave of court, he withdrew his former plea and demurred to the complaint on the ground that it did not state facts sufficient to constitute an offense. His demurrer having been overruled, and his exception noted, he was subsequently, to-wit: on the the 24th day of October, 1896, tried in the Fifth District Court of the State of Utah, in Juab County. During this trial, section 12 of Ordinance No. 10 of Eureka City, was received in evidence against defendant's objection, to which he duly excepted. The said section reads as follows: "No person shall move any building or frame of any building, into or upon any of the public streets, lots or squares of the city, or cause the same to be upon, or otherwise to obstruct the free passage of the streets, without the written permission of the Mayor or president of the City Council, or in their absence a councilor. A violation of this section shall, on conviction, subject the offender to a fine of not to exceed twenty-five dollars." At this trial the defendant was found guilty, and sentenced to pay a fine of ten dollars. From the judgment of the district court he appealed to the State Supreme Court.

and there insisted that the district court had erred in convicting the defendant under the said ordinance, for the reason that the said ordinance was void, because in contravention of section 1 of Article XIV, of the Amendments to the Constitution of the United States, in that it deprives the citizen of his property and liberty without due process of law; and that it denies to the citizens, and particularly to the defendant, the equal protection of the laws. Upon these matters the said State Supreme Court fully passed, as appears by their opinion, pages 12 to 28, of the printed record herein, and decided them adversely to the defendant, and upheld the validity of the ordinance. It is to review that judgment, that the plaintiff in error has brought his case to this court. Eureka City has no special charter, but was incorporated under the general incorporation act, approved March 8, 1888, and the particular section of the ordinance in this case, is based upon subdivisions 10 and 11, of section 1755, Compiled Laws of Utah, 1888, enumerating powers of city councils, which read as follows:

"10. To regulate the use of streets, alleys, avenues, sidewalks, cross walks, parks and public grounds.

"11. To prevent and remove obstructions and encroachments upon the same.

These powers are given to *the City Council*, and the plaintiff in error claims that the City Council cannot delegate them to the Mayor, the president of the council, a councilor, or any one else, but that it must use the powers, if at all, as a council.

The facts of the transaction out of which the prosecution grew, as they appear on page eight of the record, are

as follows: On the 15th day of May, 1895, the plaintiff in error, was the owner, and in the control, of a frame building twenty feet long, sixteen feet wide, and ten feet high, which up to that time had been occupied as a dwelling-house.

That on that day, he applied to the Mayor of the City for permission to move the building along and across Main Street, which is a principal street in Eureka City; that he stated to the Mayor at the time, that he desired to move it from where it was, which was within the fire limits, at that time, to another point within the fire limits, as defined by the ordinances. The building had been constructed prior to the time of the enactment of the ordinance establishing fire limits, and prior to any fire limits being established in Eureka City.

The Mayor refused to grant permission to move the building, stating, that if the plaintiff in error desired to remove the building outside of the fire limits, he would grant permission to do so, but would not grant permission to move the building along or across Main Street within the fire limits of the city. The distance from the point where the building stood to the point where he desired to move it is 200 feet, along and across Main Street. At the point where the building stood originally the street is fifty feet wide from the front of the buildings on the one side to the front of the buildings on the other side, part of that width being occupied by sidewalks on either side of the street; and the balance by the traveled highway; that the plaintiff in error, immediately after the permission of the Mayor was refused him, moved the building from its position into the street

with block and tackle; with rollers placed under the building; that the time occupied in moving the building altogether was from eleven o'clock a. m. till 3 or 4 p. m.

That Eureka City is a mining town and was at that time having a population of about two thousand; that along the street, where the building was moved, there were business houses or buildings close together on both sides. The building came upon the street diagonally, and after it had been gotten upon the street, it was moved along by means of block and tackle and ropes put around a steel bar driven into the street, which was driven in one place in the street. It was admitted by the prosecution that the building was moved by the defendant with reasonable diligence.

From these facts it appears that the Mayor did not rest his refusal to grant permission upon any inconvenience that might be caused to any one by Wilson's desired use of the street, but upon another ground wholly unconnected with the use of the streets. Having had the streets of the town given to him, he unceremoniously assumes to himself the powers belonging to the council, of regulating the erection or removal of buildings within the fire limits. With equal propriety he might have refused his consent on the ground that the plaintiff in error desired to use the building for a blacksmith shop or a Sunday school.

The plaintiff in error contends that this ordinance is void, becauses it places the rights of the citizens to use the streets for certain purposes, admitted by the ordinance to be proper and lawful, in case the Mayor or president of the City Council shall so decide, in the hands of an individual, who is bound by no rules to do justice in any case submitted to him.

By the Charter, the power to regulate the use of the streets is given to the City Council. That council, without any authority so to do, delegates that regulation to the Mayor. They do not prescribe any rules by complying with which the citizens shall all stand upon an equal footing and have and enjoy equal privileges. The *Lord* Mayor does not suggest that the use of the street asked for would in any, the least, degree, interfere with the ordinary travel thereon, nor offer any suggestion having any relevancy to the question, why he should not hear the prayer of Wilson. He said, if the applicant desired to move the building outside the fire limits, he would grant him permission to do so. This kind of municipal legislation did not first appear in Eureka City. Other City Councils had tried it before. Grand Rapids, Michigan, enacted an ordinance of which the first section was as follows: "No person or persons, association or organizations, shall march, parade, ride or drive in or upon or through the public streets of the city of Grand Rapids, with musical instruments, banners, flags, torches, flambeaux, or while singing or shouting, without having first obtained the consent of the Mayor or Common Council of said city; funeral and military processions, however, shall not be subject to the foregoing provisions of this section; but such processions, as well as those having the permit or consent of the Mayor or Common Council, when using the public streets of said city, shall conform to such directions as the Mayor or Chief of Police may give in relation to the streets to be used, and the portion thereof to be occupied by them, and in relation to the manner of such use."

Section five of the same ordinance provided for the

punishment of offenders against the first section.

By the charter of that city, among other powers granted to the Common Council were the following:

"2. To prevent the cumbering of streets, sidewalks, etc., in any manner whatever.

"3. To control, prescribe and regulate the manner in which the 'highways, streets, avenues, lanes, alleys, public grounds and spaces within said city shall be used."

In the case of *Frazee* who was prosecuted for a violation of that ordinance, the Supreme Court of Michigan,

Matter of Frazee, 63 Mich. 396,

(S. C. 6 Am. St. Rep. 310),

in construing the ordinance under the Charter power of the city said: "If the legislature of the state had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and having such power, had clearly signified their purpose to do so, then it might perhaps be claimed, with some show of reason, that the city of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers. All Charters and all laws and regulations, to be valid for any purpose, must be capable of construction, and must be construed in conformity to constitutional principles, and in harmony with the general laws of the land; and any by-law which violates any of the recognized principles of legal and equal rights is necessarily void so far as it does so, and void entirely if it

cannot be reasonably applied according to its terms." And farther on in the same opinion (page 317, 6, Am. St. Rep.) "Whatever regulation is made must operate uniformly, under the same conditions. It is competent to hold all persons liable for any actual wrong done which creates dangerous or noxious consequences. That is already provided for under the law of nuisances. These processions might, no doubt, become nuisances, as others might do, but it cannot be assumed that they will; and it appears in the record before us, that they have been judicially adjudged otherwise when prosecuted. Any doctrine that would hold them legally objectionable in themselves would cover every military or political or society procession that ever assumed respectable proportions. All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of any one. This doctrine, as applied to public officers, was recognized in *Horn vs. People*, 26 Mich, 221. It is quite as applicable to the Common Council, acting by resolution on particular cases. The law must be impartial and general, or it is no law. It is only where power is given to license that permissive action can be left to particular cases. If this were allowed in the case of processions, it would enable a mayor or council to shut off processions of those, whose notions did not suit their views or tastes in politics or religion, or any other matter on which men differ. When men in authority have arbitrary power, there can be no liberty."

The same question, practically, arose in the case of State Ex. Rel. Garrabad vs. Dering, 84 Wis. 585. (S. C. 36 Am. St. Rep. 948).

In construing the ordinance the court said:

"It is susceptible of being applied to offensive and improper uses, made subversive of the rights of private citizens and it interferes with and abridges their privileges and immunities, and denies them the equal protection of the laws in the exercise and enjoyment of their undoubted rights. In the exercise of the public power, the common council may, in its discretion, regulate the exercise of such rights in a reasonable manner, but cannot suppress them, directly or indirectly, by attempting to commit the power of doing so to the Mayor or any other officer. The discretion with which the council is vested is a legal discretion, to be exercised within the limits of the law, and not a discretion to transcend it or to confer upon any city officer an arbitrary authority making him in its exercise a petty tyrant. Such ordinances or regulations, to be valid, must have an equal and uniform application to all persons, societies or organizations similarly circumstanced and not be susceptible of unjust discriminations, which may be arbitrarily practiced to the hurt, prejudice, or annoyance of any."

A similar ordinance was declared void by the Supreme Court of Kansas in the case of

Anderson vs. City of Wellington, 40 Kan. 173.

(S. C. 10 Am. St. Rep. 175.)

In the opinion in that case, the court said: "It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons combined for legal and meritorious purposes to

parade the streets with music." And also: "All by-laws made to regulate parades must fix the conditions upon which all persons or associations can move upon the streets expressly and intelligently; such conditions operating on all of the same class alike, and being reasonable in their requirements, and not oppressive in their operation, and must not give the power of permitting or restraining processions to an unregulated official discretion, and thus allow an officer to prevent those with whom he does not agree on controverted questions from calling public attention to the principles of their party or the objects of their organization in one of the most effectual methods known to associated effort.

The city of Baltimore had an ordinance, which, among other things, contained the following: "That no person should erect, build, or have put up any steam saw mill or machinery or any steam engine for any purpose whatever, or planing machine, or machinery within the limits of the city, without first obtaining the sanction of the Mayor and City Council." And another section as follows: "All permits granted for steam boilers and steam engines and boilers may be revoked, and the same shall be removed after six months notice, from the Mayor, and any one receiving such notice, who shall refuse or neglect to conform to the requirements of the same, shall pay a fine not exceeding one hundred dollars, etc." In passing upon the question of the validity of that ordinance, the Supreme Court of Maryland held it void, in the case of

Mayor, etc., of Baltimore vs. Radecke, 49, Md. 217.

(S. C. 33 Am. Rep. 239).

In the opinion the following language occurs: "It"

(the ordinance) "does not profess to prescribe regulations for their construction, location or use, nor require such precautions and safeguards to be provided by those who own and use them as are best calculated to render them less dangerous to life and property, nor does it restrain their use in box factories and other similar establishments within certain defined limits, nor in any other way attempt to promote their safety and security without destroying their usefulness. But it commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether. But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality or oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partizan zeal or animosity, from favoritism and other improper influences and motives easy of concealment and difficult to be detected and exposed, it becomes unnecessary to suggest or to comment upon the injustice capable of being wrought under cover of such a

power, for that becomes apparent to every one who gives to the subject a moments consideration. In fact, an ordinance, which clothes a single individual with such power, hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void. Resting our decision as to the validity of this ordinance on this ground, we shall not consider the question whether it is also void as an unauthorized delegation of a public power or trust."

The city of Chicago had an ordinance, the first section of which was as follows: "That no parades or processions shall be allowed upon the streets of the city, nor shall any open air meeting be held upon any ground abutting upon any street or avenue of the city, until a permit therefor shall be first obtained from the police department, under a penalty of not less than $25, nor more than $100. Such permits shall be issued without fee by the superintendent of police, and shall, in case of parades and precessions, specify the route to be followed upon the streets of the city." In declaring this ordinance void, in the case of

City of Chicago vs. Trotter 136 Ills. 430.

The Supreme Court of Illinois said:

"The ordinance in question seems to recognize the fact that all processions are not to be repressed, and seems to proceed upon the theory that some of such demonstrations are to be allowed and permitted, and others prevented. It does not however, fix and determine the conditions under which parades and processions will be unlawful. It merely leaves it to the discretion or caprice of the superintendent of police to imperatively prescribe who shall be permitted to gather together in such processions, and who shall not; to dictate

that the members of one political party, or of one religious denomination, or of one civic society, may, and the members of another political party, religious denomination or civic society may not, have such parades or processions, and to arbitrarily fix the times, occasions and localities when and where such assemblages will be allowed. Under the ordinance, the superintendent of police has even authority to prohibit all street parades and processions whatsoever. It is subversive of the liberty of the citizen, and outside of the domain of the law, that authority so arbitrary should be lodged in one individual. The powers that were granted by the State, and that are relied upon by the municipality, were delegated to the City Council, and that body could not transfer its legislative prerogatives, and the public trust which was imposed upon it, to a mere elective officer."

It seems clear that this language will apply with equal force to the case at bar. The Eureka ordinance leaves no doubt that it may be lawful sometimes, in some parts of the city, under some circumstances, to use the streets for what may be conceded to be an uncommon use, but certainly not an idle, vicious, or unnecessary use. By passing this act the City Council admitted that such a use of the streets might become necessary for the occommodation of the citizens, and they thereby recognized both the necessity and the propriety of such use. Having then created, or recognized and acknowledged this legal right in the citizens to use the public streets for such a purpose, why should they then place this right in the hands of an individual who might withhold it from one person arbitrarily, and dispense

it to another in precisely the same situation in all respects? By the terms of this act, the Mayor is governed by no rules imposed by the law-making power; he is responsible to no one for an abuse of his power; and there is no way provided by which his decision can be questioned or appealed from. He is supreme in his sphere, and truly monarch of all the streets, that any body surveys, in Eureka City. To the man who played "heeler" to elect him to his throne the latchstring may be out, while no one who happened to be in a different political combine need apply for these privileges, which are given to the Mayor for distribution to his favorites. These rights are the people's and no set of city councilmen can withdraw them from the people and give them to a petty tyrant to use as small change.

With characteristic legal acumen the learned Supreme Court of Utah, in their opinion in this case, at the bottom of page 15 of the printed record, say: "It is true there is a discretion vested in an officer, but such discretion does not mean an absolute or arbitrary power. It is a legal discretion which must be exercised in a reasonable manner. Where the law leaves the exercise of a power to the discretion of an officer, it does not mean that he shall exercise such discretion wantonly or arbitrarily, to the injury of any subject. Such officer is responsible for an abuse of the power. The authority or power is not his." Now I have no doubt but that language expresses what the Utah Supreme Court thought about this controversy. But what has that to do with the *constitutional law* of the case? Perhaps, at some time, the same learned court may suggest what Wilson could have done when the Mayor of Eureka refused to

give him permission to move his building, by way of redressing his wrongs. Suppose Wilson had mandamused him to compel him to grant permission, would he not have been answered in the language of this court in the case of Yick Wo vs. Hopkins 118, U. S. 356, where they said, at page 366, "So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus*, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of the term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint?" That appears to have been precisely the attitude of the Mayor in this case. No reason offered why the street should not be used; only an objection to the distination of the building. No hint that it was a busy day on the street, such as an unusual number of people or vehicles or traffic on the street. Was Wilson bound to pay any attention to this little tyrant? What free man would have done less than he did? What claim has one, who would do less, to the name of a *man*. It will not do to say he ought to have obeyed the ordinance and looked to the law for redress. If the ordinance is valid, there is no redress, because the government by law is at an end, and chaos reigns obedient only to the whims and

caprices of little mayors. It is true, Wilson could have licked the hand that smote him, and left his building standing where it was. Suppose every man in that town for some reason sufficient to himself, had concluded to move his building, and the Mayor had peremptorily refused permission to every one. Could a more complete tyranny and abuse of power be imagined? And yet that would have been equal and exact (*in*) justice to all under the powers given to the Mayor by this ordinance. Suppose again, that he had given the permission to every one who had voted for him, and withheld it from all who had opposed his election. Where can any one find room for complaint under that ordinance? It gives him the power without any restraint or rules of any kind, and leaves him to exercise it according to his own sweet will. The learned Supreme Court of Utah say near the end of their opinion, "The case of Yick Wo vs. Hopkins 118 U. S. 356, was one of race discrimination and is not in point here." The truth is, that very few decisions of the United States Supreme Court exactly square with the Utah Supreme Court's views of the law.

We wish now to call attention to that case of

Yick Wo vs Hopkins 118 U. S. 356.

That was a case arising under an ordinance of the City of San Francisco, of which section 68 was as follows: "It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without first obtaining the consent of the Board of Supervisors, except the same be located in a build-

ing constructed either of brick or stone." It is true the plain intent of this ordinance was to discriminate against the Chinese, but it is the *form* of the ordinance that makes that discrimination *possible.* And the form is the same as that of the ordinance involved in this case. It would seem that a white citizen should be entitled to the same protection under the Federal Constitution as a Chinaman, under like circumstances. In deciding that this ordinance was unconstitutional, this court,speaking by Mr. Justice Matthews said:

"It" (the ordinance) "does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living." And farther, beginning at the bottom of page 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they

do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by the means of the suffrage. But the fundamental right to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law, which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth may be a government of laws and not of men. For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Again, at page 371: "The same principle has been more freely extended to the quasi-legislative acts of inferior municipal bodies, in respect to which it is an ancient jurisdiction of judicial tribunals to pronounce upon the reasonablenss and consequent validity of their by-

laws. In respect to these, it was the doctrine, that every by-law must be reasonable, not inconsistent with the Charter of the Corporation, nor with any statute of parliament, nor with the general principles of the common law of the land, particularly those having relation to the liberty of the subject or the rights of private property." Although we have the solemn adjudication of the Supreme Court of Utah, that the opinion from which the foregoing quotations are made, is not in point upon the issue at bar, we must still confess our inability to understand why it is not. Were the Chinamen's or any other laundrymen's interests or rights any more completely in the hands and power of the board of supervisors, than Wilson's right to use the street of Eureka City for a certain confessedly lawful purpose was in the hands and power of the Mayor? One would almost think that before our State Supreme Court can see the application of Constitutional principles, they must be able to see a Chinamen's "queue", or smell dirty clothes.

We submit, that a people's necessities make their rights, when uses of streets and highways are in question. It is no greater obstruction to a street to move such a building as Wilson's was upon it, than to pile building materials in the streets while constructing buildings upon abutting property. Speaking of this subject Mr. Dillon in his work on Municipal Corporations Sec. 730 says: "We have heretofore shown that the primary purpose of a street is for passage and travel, and that unauthorized and illegal obstructions to its free use come within the legal notion of a nuisance. But it is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanc-

tioned by any express legislative or municipal authority. On the contrary, ~~the~~ *the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions.* The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction of the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvements of the adjoining lots, by digging cellars, by building, etc.; this may occasion a reasonable necessity for using a part of the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as they are, reasonably necessary. There need be no *absolute* necessity; it suffices that the necessity is a *reasonable* one. But this will never justify the leaving of the street or way in an unsafe and dangerous condition, or its use in an unreasonable manner or for an unreasonable time." The Supreme Court of New Hampshire in the case of

Graves vs. Shattuck, 35 N. H. 257.

(S. C. 69 Am. Dec. 536.)

held that moving buildings on suitable streets, with expedition and care, is permissible. Measured by these rules, it can hardly be maintained that Wilson was not making a reasonable use of the street, when he moved a frame building 20 by 16 feet a distance of 206 feet in four or five hours time, especially, when it is remembered that there is no

pretense in the testimony that any single person or any interest whatever was inconvenienced.

The opinion of the court in the case of

Eureka City vs. Wilson, 15 Utah, 67,

contains some strange language, when considered in connection with that employed in the case at bar. At page 72 the court in passing upon the validity of another ordinance said: "Section one of the ordinance in question in this case defines the fire limits of Eureka City. Section two, above quoted, in conformity with the statutes, prescribes the kind of material to be used in the construction of buildings within the fire limits, which shall be brick, stone, iron, or other incombustible material. It also prescribes that certain classes of buildings, giving particular descriptions of the same, may be constructed with combustible material within such limits. Then follows a proviso wherein the Committee on Building is empowered, on application therefor by any person, to grant permission to erect any building with combustible material, under such regulations and restrictions, as that committee may provide. All the provisions of section 2 not contained in the proviso appear to be authorized by the statute, and to conform to the principles hereinbefore stated, respecting ordinances. By adding the proviso, however, the Council has attempted to confer upon a committee, not only an absolute power, which would enable it to defeat the very object of the ordinance at its mere will and pleasure, but also a legislative power, which would enable it to perform a duty imposed upon the Council itself by the statute, and that is to provide regulations and restrictions to control the grant-

ing of permission according to the provisions of the ordinance. This the Council had no power to do. The erection of a wooden building in any part of the city is not in itself unlawful. It only becomes so when forbidden by law, within the fire limits, for the security of persons and property, and the promotion of the interests and good order of the city; and while a City Council in this state may prohibit, by ordinance, the construction of buildings, within fire limits, of combustible material, still it cannot confer a power upon a committee, such as is attempted to be conferred by the proviso, which may be used as a means for unjust and arbitrary discrimination between citizens. If this proviso were valid, then, no matter what regulations and restrictions the committee might adopt, it would still be within its power to grant permission to one person to erect a wooden building and refuse the privilege to another under the same circumstances. The statute vested in the Council the exercise of powers of legislation respecting the establishing of fire limits and the construction of buildings therein. This demands a discretion in the Council itself, and cannot be delegated. The proviso cannot be justified as a reasonable exercise of the authority conferred by the statute, and is void." Of course we would not like to ask the court to consider any decision of the Supreme Court of Utah as authority, because our oath as an attorney forbids that we wilfully seek to mislead the Court, but the language just quoted resembles very much in spirit that used by this Court in the case of Yick Wo vs Hopkins. Perhaps the fact that the ordinance which the Utah Court was then considering was in some way connected with *fire*, and that *fire* is used in *washing*, enabled

them to see some similarity between that case and the Chinese wooden laundry case.

The City of East St. Louis had an ordinance which delegated to the Treasurer of the city the power to determine the amount that each applicant for a license to keep a dram shop should pay—not less than $50 for six months. This ordinance was enacted under a charter which contained the following language: "The City Council shall have power to restrain, prohibit and suppress tippling-houses, dram-shops, gaming, bawdy, and other disorderly houses." In construing the ordinance under the charter, the Supreme Court of Illinois in the case of

City of East St. Louis vs. Wehrung, 50 Ill. p. 31

said: "This provision manifestly intended that the power should be exercised by the City Council, under reasonable and proper ordinances, and not that they should authorize an individual to grant or refuse a license, or to fix the amount which should be paid for a license. If the treasurer may, under this ordinance, refuse license with the concurrence of the Mayor, then they, and not the City Council, would regulate or suppress dram-shops; and if the treasurer may, in his discretion, fix the sum to be paid, then he, and not the City Council, would discharge the duty. In the proper exercise of this power, the City Council should adopt general ordinances, prescribing a general rule by which licenses may be obtained. They might, no doubt, prescribe the character of persons who might, or might not obtain licenses; or they might, in their regular or called meetings, in such manner as they might ordain, grant

such licenses. The ordinances should prescribe the amount required to be paid for each license, either by an ordinance relating to the entire city, or grade the rates by divisions or portions of the city, or otherwise. The ordinance should be of that general character that all persons coming within its requirements should be entitled, by complying with its provisions, to receive a license. And the amount to be paid should be determined by ordinance or order of the council, and not left within the discretion of a single officer of the city. It is, however contended, that appellee was liable to the forfeiture, notwithstanding the ordinances are unwarranted, inasmuch as the city, by section 8, declares that any person who shall engage in the trade or business of selling liquor contrary to the ordinance shall be subject to a fine for each offense. There is, no doubt, power conferred upon the city to prohibit the sale of such liquors within the limits of the city; but it is obvious that such was not the purpose of the ordinance, as the authorities, on the contrary, endeavored to provide the means by which such traffic might be carried on in the city. It then follows, that the Common Council have neither prohibited the sale of spirits without a license, nor have they regulated its sale; nor has the city charter rendered it penal to sell liquors without a license. Hence the city has no right to recover a penalty, until they shall, by proper ordinance under their charter, either prohibit the sale of liquor, or regulate its sale by an ordinance free from objection, and fix a penalty for a violation of such ordinance." The court accordingly held the ordinance void.

To the same effect is the case of

Bryan vs. City of Chicago, 60 Ills. 507, and

Kinmundy vs. Mahan et al. 72 Id. 463.

Hydes and Goose vs. Joyes 4 Bush 464.

(S. C. 96 Am. Dec. 311).

Thompson vs. Schermerhorn 6 N. Y. 92.

Davis vs. Read et al. 65 Id. 566.

Birdsall vs. Clark et al. 73 Id, 73.

Lyon vs. Jerome, 26 Wend. 484.

The Supreme Judicial Court of Massachusetts held in the case of

Day vs. Green et al. 4 Cash. 433.

That where a by-law of a city prohibits the moving of buildings through the public streets, without a license granted by the Mayor and Aldermen, the board of Aldermen cannot delegate to the Mayor alone the power to grant such licenses. That the Mayor of a city, who, under the authority of an order of the board of Aldermen, which they had no power to pass, has granted a license for the moving of a building through the streets, is not estopped, in an action of trespass against him, for moving the building out of the street, where it has been left by the owner in the course of such removal, to set up the invalidity of the license. In the opinion, the Court, speaking by Chief Justice Shaw, uses the following language, at 438: "But the question of law is, whether the Mayor alone had authority to grant such license. It appears by the case, that after the passage of the by-law, the City Council, the Mayor and Aldermen, in May, 1847, passed a

vote, authorizing the Mayor to grant licenses for the removal of buildings, in all cases, in which he might deem it expedient, under the regulations and upon the conditions prescribed by the city ordinance. The Court are of the opinion, that the authority thus vested in the board, organized and acting together as an administrative body, could not be delegated by them to a single member, although the constitutional head of such board, to be exercised according to his views of expediency. By the organization of city governments in this commonwealth, Aldermen are elected with a view to their judgment and experience, their knowledge of what is just to the individual, and necessary to public safety and convenience. When, therefore, such a power is granted to the Mayor and Aldermen, constituted as they are, to act as one deliberative and administrative body, confidence is reposed in their united wisdom and experience, in deciding both upon the fitness of granting a license, dependent upon the local position, the width of the streets, the magnitude of the building, the season of the year, and all similar circumstances and in prescribing the conditions necessary to the public safety and convenience."

We confess our inability to see any difference between the principles involved in that case and the case at bar. The order of the Mayor and Aldermen conferring the power of licensing upon the Mayor alone was declared void and therefore no one could rely upon it. Here, the attempt of the City Council to confer a power, which the Charter vested in them as a council—a deliberative and administrative body—upon a single individual, the Mayor or president of the Council or a Councilor, was also a nullity and no one

was bound to pay any attention to it. While it is possibly true, that, under the Charter, the City Council *might* have absolutely prohibited the use of the streets contended for by the plaintiff in error, it is clearly apparent that they never intended to do so, and in the language of the Supreme Court of Ills., in the case of City of E. St. Louis vs. Wehrung, 50 Ills. at page 32, "The power conferred on the City in reference to this subject has not been properly exercised, and, until it shall be, it remains dormant, subject to be called into active exercise whenever the city shall see proper to act in the manner authorized by their Charter." See also the paragraph of that decision immediately preceding the language above quoted.

That powers vested in Common Council may not be by it delegated to others, see

City of Oakland vs. Carpenter et al 13 Cal. 540.

Zabel vs. Louisville Baptist Orphans' Home 13 L. R. A. 668 (Ky.)

McCrowell vs. Bristol 20 L. R. A. 653 (Va.) and note.

State vs. Kantler 21 N. W. Rep. 857. (Minn.)

People vs. Haug 37 N. W. Rep. 21 (Mich.)

Minneapolis Gas Light Co. vs. Minneapolis 30 Id. 450 (Minn.)

City of St. Louis vs. Russell 20 L. R. A. 721 (Mo.) and note.

I. Dillon's Municipal Corporations (Fourth Ed.) Sec. 96.

Cooley's Const. Lim. (Fifth Ed.) 249.

From the record in this case it will be readily seen,

that the amount of money involved can be but a small item in the controversy. The importance of the question whether that small amount can be *lawfully* taken from the citizen under the facts and circumstances of this case must be our only apology for trespassing upon the time of this court. The plaintiff respectfully submits, that unless prohibited by positive law, he had a right to use the street of the city for the purpose for which he used it. That the attempt to legislate upon the subject, made by the City Council, was absolutely void, because it committed to the mere will and caprice of a single person, with no rules to guide his actions, and no responsibility to any earthly power, the powers of local government which had been by law vested in them as a body. That by the exercise of this arbitrary power in a tyrannical manner, the Mayor sought to deprive him of a right to the use and enjoyment of his property, not unreasonable, nor in violation of the rights of other people, without due process of law, and that he was thereby denied the equal protection of the law. He claims that under the great charter of our liberties he has protection against such acts of one man power. His contention has been denied at every step along the way, and now he knocks at the door of the last tribunal that can hear his plea, and, if here he can get no relief, he must, and will, bow reverently to the last voice that speaks upon our constitutional liberties.

Respectfully Submitted,

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